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The Courts and Grant Reform: A Time for Action

By George D. Brown

Beyond a doubt, there is a "law" of federal grants. Its most obvious manifestation is the hundreds—probably thousands—of federal court decisions concerning the award or administration of federal financial assistance. Indeed, the judiciary has assumed such a substantial role in the operation of the intergovernmental aid system that it would seem difficult to understand the functioning of that system—let alone reform it—without an appreciation of what the courts are doing, and why.

Yet, the current intergovernmental reform efforts devote little or no attention to the judicial role. The same is true of many analyses of the grant system and its problems. This article raises the question of whether such "benign neglect" is sound public policy, especially during a period of intense interest in grant issues. Is not the law of federal grants too important to be left to the lawyers (and the courts)? Should not those who design, work with, and analyze grant programs recognize the phenomenon and seek to influence it?

To give the reader a sense of the type and magnitude of the questions with which courts deal, the article begins with an analysis of three salient questions in grant law:¹ Can grantees overturn grant conditions, who can sue to enforce conditions, and what remedies are available? Next, the volume, causes, and possible impacts of grant litigation are considered. The article concludes with some modest proposals for change and for future study.

Three Salient Issues in Grant Law

Can Grantees Overturn Grant Conditions?

Federal grants—even General Revenue Sharing—come with "strings" attached. Thus, there is always an inherent tension between the grantor's desire to see funds expended in a certain way and the grantee's desire for flexibility. However, federal strings extend far beyond the area of "how the money is spent" as that term is normally used. Receipt of federal funds can now affect virtually all facets of state and local government, ranging from organization and personnel practices, through concern for national values such as nondiscrimination, to the very processes of government itself. According to one analyst, the

dynamic federal assistance area is where many of the most crucial issues confronting contemporary federalism arise, including the mandated "use" of states by the national government for some of its own regulatory purposes, a reliance on the spending power and the conditions that may be attached thereto to achieve regulatory purposes beyond the scope of the commerce power, and the use of grant conditions to force Constitutional and institutional changes in recipient governments. . . .²

Recipients might chafe at such conditions, but any possibility of judicial relief seemed, until recently, blocked by the Supreme Court's insistence that since participation in grant programs is voluntary, objectionable conditions can be avoided by not participating. The Court first enunciated this principle in the 1923 case of *Massachusetts v. Mellon*,³ declar-

¹The term "grant law" obviously encompasses more than a group of court decisions. It includes statutes, regulations, and, arguably, a set of general principles. This article focuses primarily on the functional role of the courts in the operation of the system, although the Constitutional cases also illustrate the role of the courts in establishing underlying principles.

²David B. Walker, *Toward a Functioning Federalism*, Cambridge, MA, Winthrop Publishers, 1981, p. 154.

³262 U.S. 477 (1923).

ing that the state had "the simple expedient of not yielding," i.e., not participating, if it thought a grant program invaded its reserved powers. The Court reinforced the notion of voluntariness in a 1937 decision,⁴ which did not involve a grant program, and in *Oklahoma v. Civil Service Commission*,⁵ which did. In *Oklahoma* a state attacked a particular grant condition: the Hatch Act's prohibition on political activity by state or local officials involved in the administration of federally financed programs. *Oklahoma* argued that this condition had the effect of regulating its internal political processes, and thus interfered with its reserved powers. The Court disagreed. Citing *Massachusetts v. Mellon*, the Court reiterated that *Oklahoma* had the "simple expedient of not yielding." The opinion also noted that "[t]he offer of benefits to a state by the United States dependent upon cooperation by the state with federal plans, assumedly for the general welfare, is not unusual."

This steadfast adherence to the doctrine of voluntariness is troubling for several reasons. First, the Court has recognized limitations upon Congress' ability to attach conditions to expenditures when these conditions infringe upon the rights of persons.⁶ Second, the doctrine of voluntariness rests upon a premise that is no longer true: that the expedient of not yielding is "simple." It is not simple, or feasible, for many jurisdictions in which federal funds make up a sizable portion of their operating budgets. Giving up federal funds is particularly difficult in the case of large programs such as revenue sharing and AFDC. Although there have been an increasing number of instances of withdrawal and nonparticipation, for most grantees the expedition is a fiction. A third troublesome aspect relates to conditions which apply across-the-board to many or all federal grants. Clearly if the recipient objects to these, not yielding becomes exceedingly complex and painful.

The State Sovereignty Attack. The Supreme Court's 1976 decision in *National League of Cities v. Usery*⁷ suggested that concerns about an overreaching grant system might attract judicial support. In that case the Court struck down amendments to the *Fair Labor Standards Act* which extended coverage to state and local employees. The majority reasoned that the Constitution contained, implicitly and explicitly, a principle of respect for essential attributes of state sovereignty, and that this principle could limit Congressional action even in a field—interstate commerce—where its authority to act was unquestioned.

The logic of the N.L.C. opinion would seem to apply equally well to Congressional actions affecting

the states through exercises of the spending power. The majority, however, treated this issue as an open question; and three dissenting justices read the decision as having no effect on Congress' power to impose strings. The N.L.C. decision generated a barrage of grantee attacks on grant conditions based on state sovereignty grounds. However, the lower courts have invoked, at times almost mechanically, the voluntariness rationale and rejected the challenges.⁸

One of the best known of these cases is *Florida Department of Health and Rehabilitative Services v. Califano*.⁹ As a reorganization reform, Florida had consolidated its vocational rehabilitation services, along with other health functions, into a broad human services agency. The U.S. Department of Health, Education and Welfare ruled that the new structure would not meet the organizational criteria of the *Rehabilitation Act* and that Florida would be ineligible for further funding under that program. The state challenged the decision, in part on Constitutional grounds.

The district court had little difficulty in harmonizing N.L.C. with the foundation cases on voluntariness. N.L.C. involved a direct displacement of state (and local) freedom to act since it involved coercive legislation enacted under the commerce power. On the other hand, any federal intrusion through a grant program would be, at best, indirect, given the voluntary nature of grants. "The [Rehabilitation] Act does not impose a set of coercive, mandatory requirements such as were involved in *National League of Cities*."¹⁰ Although other federal courts have utilized similar reasoning in rejecting grantee challenges to grant conditions, the state sovereignty argument refuses to go away. A number of legal commentators, as well as the ACIR, have insisted that it be taken seriously.¹¹ Two recent Supreme Court decisions suggest that the issue is not dead after all.

In *Fullilove v. Klutznick*¹² a divided Supreme Court rejected a Constitutional challenge to the requirement that 10% of the funds granted to state and local governments under a public works program be set aside for minority businesses. In his plurality opinion Chief Justice Burger considered the powers Congress had employed in enacting the set aside provision. He viewed the program as primarily an exercise of the spending power and reasoned that any action permissible under one of the regulatory powers was clearly permissible under the spending power. He concluded that the commerce power provided ample authority "insofar as the program objectives pertain to the action of private contracting parties

⁴*Steward Machine Co. v. Davis*, 301 U.S. 548 (1937). The case involved the Constitutionality of the federal unemployment compensation program, in particular, whether states were coerced to participate.

⁵330 U.S. 127 (1947).

⁶See *Shapiro v. Thompson*, 394 U.S. 618, 641 (1969).

⁷426 U.S. 893 (1976).

⁸E.g., *City of Macon v. Marshall*, 439 F. Supp. 1209 (M.D. GA. 1977).

⁹449 F. Supp. 274 (N.D. Fla.), *aff'd*, 585 F. 2d 150 (5th Cir. 1978).

¹⁰449 F. Supp. at 284.

¹¹E.g., Lewis Kaden, "Politics, Money, and State Sovereignty: The Judicial Role," *Columbia Law Review*, 79, June 1979, p. 874. See Advisory Commission on Intergovernmental Relations, *In Brief. The Federal Role in the Federal System: The Dynamics of Growth*, B-4, Washington, DC, U.S. Government Printing Office, 1980, pp. 31-32.

¹²100 S. Ct. 2758 (1980).

...” However, states and local governments were affected as well. The Chief Justice noted that N.L.C. imposed limitations on the reach of the commerce power to these governments, but that the Fourteenth Amendment was an adequate source for this aspect of the program. For the purposes of this article, the key point is that three members of the Court cited N.L.C. as relevant to a discussion of the validity of a grant-in-aid condition.

The issue surfaced again—and again, somewhat obliquely—in *Pennhurst State School and Hospital v. Halderman*,¹³ a 1981 case involving conditions at a state facility for the mentally retarded. The plaintiffs asserted federal Constitutional and statutory claims as well as claims based on state law. At issue before the Supreme Court was whether the “bill of rights” provision of the **Developmentally Disabled Assistance and Bill of Rights Act** imposed requirements on states participating in the program.

It must be noted that the defendants did not contest the validity of any condition but asserted that the bill of rights was separate from the Act’s conditions. Nonetheless, the majority noted “[t]here are limits on the power of Congress to impose conditions on the states pursuant to its spending power” The opinion cited the Chief Justice’s opinion in *Fullilove* as direct support for this proposition and also cited N.L.C. as general support. (In addition, the Court cited an opinion by Justice Cardozo which suggested that inducement to participate in a program might reach the level of coercion.)¹⁴ This discussion may be of limited precedential value since it is set forth in a footnote and is not directly relevant to the actual decision. Still, Supreme Court footnotes are often harbingers of things to come; and this particular statement may force lower courts to take more seriously challenges to grant conditions based on state sovereignty grounds.

The Pennhurst “Clear Statement” Rule. The actual decision in *Pennhurst* suggests additional arguments which grantees may make in attacking conditions, particularly those imposed by grantor agencies. The Court held that the statute’s bill of rights was not one of the conditions which the Act imposed on grantees. The majority analyzed the grant device as “much in the nature of a contract” Thus,

The legitimacy of Congress’ power to legislate under the spending power rests on whether the state voluntarily and knowingly accepts the terms of the “contract.” There can, of course, be no knowing acceptance if a state is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. (Emphasis added, citations and footnotes omitted.)

At this point, one can only speculate as to the im-

“ The actual decision in *Pennhurst* suggests additional arguments which grantees may make in attacking conditions, particularly those imposed by grantor agencies.”

pact of the Court’s “clear statement” rule. Since the opinion referred to the “legitimacy” of Congressional action, it may be that unclear or retroactive conditions will be invalidated, particularly if they would impose heavy financial burdens. Taken seriously, this approach would call into question basic features of the grant system such as enactment of new cross-cutting conditions which apply to existing programs. (The Court did state that Congress cannot “surprise participating states with postacceptance or ‘retroactive’ conditions.”) It is more likely that, as in *Pennhurst* itself, the clear statement rule will be used as a canon of statutory construction. Thus, bills of rights, Congressional statements of policy, etc., will not be viewed as conditions at all, and expressly stated conditions will be narrowly construed.

Far more promising, from the grantee perspective, is the possibility that *Pennhurst* sets the stage for attacks on administrative implementation of grant strings—through regulations, guidelines, etc.—on the ground that the agency has imposed duties beyond those contained in the relevant statute itself. Of course, if the administrative interpretation is known at the time of acceptance of the grant, any argument based on contractual theory is substantially weakened.¹⁵ It has been suggested that the Court’s citations of 11th Amendment cases such as *Edelman v. Jordan*¹⁶ is significant, since these cases require “strong evidence” that a state has surrendered prerogatives of sovereignty, and that, by implication, this evidence must be found in the relevant statute.¹⁷ (It is not clear whether this analysis helps local grantees, whom the 11th Amendment does not protect.)

Even before *Pennhurst*, courts were beginning to take a hard look at implementing regulations of grantor agencies, at times declaring them invalid.¹⁸ *Pennhurst* will surely add impetus to this development. In the words of one former regulator, “It is likely to provide a philosophical and legal basis for the re-examination and likely elimination of a broad range of terms and conditions in federal grant pro-

¹³Stewart Baker, “Making The Most of *Pennhurst*’s ‘Clear Statement’ RULE,” p. 4. (Paper prepared for the Center for State and Local Advocacy Project in 1981. On file with the author.)

¹⁴415 U.S. 651 (1974).

¹⁵See Baker, *supra*, at 5-7.

¹⁶E.g., *Islesboro School Committee v. Califano*, 593 F. 2d 424 (1st Cir.) cert. denied, 100 S. Ct. 467 (1979).

¹⁷101 S. Ct. 1531 (1981).

¹⁸*Steward Machine Co. v. Davis*, 301 U.S. 548, 589-90 (1937).

grams"¹⁹ In a recent concurring opinion, Chief Justice Burger sent the lower federal courts a strong message along these very lines.²⁰

Who Can Sue? The Retreat from *Thiboutot*

There are two major types of federal grant litigation: grantor-grantee disputes and third party litigation. Grantor-grantee disputes are usually initiated by grantees or would-be grantees and generally involve such matters as denial of a grant, reimbursement disputes, terminations, suspensions, and other fiscal issues. Although there has been an increase in such suits, the second category—third party suits—has primarily been responsible for the grant law explosion. And these suits are the ones most affected by the question, who can sue?

In third party suits, plaintiffs typically assert that they are beneficiaries either under a condition of the grant statute itself or a "cross-cutting" provision applicable to grants on a more general basis. Such plaintiffs frequently encounter "threshold" obstacles: that is, does this person have access to a federal court to present his or her claim, apart from the merits of that claim as stated? A principal question is whether the plaintiffs have a "right (or cause) of action" to enforce duties created by the underlying statute. In the grant context, statutes usually say what the grantee must do in return for the funds but are silent as to third party judicial enforcement of these conditions. The norm is to provide for administrative enforcement by the grantor agency itself. Frequently, courts have "implied" a private right of action by construing the statute as containing such a right, albeit not explicitly stated.²¹

As an alternative, third party challengers have asserted that, in the case of grants to governmental entities, 42 United States Code Section 1983 confers upon them an express right to enforce grant conditions. That statute provides that

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

Plaintiffs have argued that since grant conditions are "laws" of the United States, any suit to enforce

them is covered by Section 1983. In its 1980 decision in *Maine v. Thiboutot*²²—a third party grant suit—the Supreme Court appeared to accept this argument without qualification. The Court emphasized the "plain language" of Section 1983 and declined to limit it to any "subset" of laws. Many observers saw the decision as paving the way for a vast increase in suits and liabilities, including attorney's fees. However, two recent cases suggest strongly that the Court intends to step back from the plain language of *Thiboutot* and restrict the ability of third party challengers to bring suit.

Pennhurst was precisely such a case. The Court, by a margin of 6 to 3, held that plaintiffs could not sue to enforce the statutory bill of rights, and remanded the case for consideration of their claim that they could sue to enforce the assurances made by the grantee. Although that claim was not before the Court, Justice Rehnquist—for a five man majority—suggested several obstacles it might encounter. As far as threshold problems are concerned, he first raised the question whether the assurances could be considered "rights" secured to the plaintiffs as required by Section 1983. He also noted that the underlying statute contained an express remedy—administrative imposition of fiscal sanctions—and suggested that this remedy might be considered exclusive, thereby precluding any Section 1983 suit.

These statements are "dictum," observations by the Court which were not necessary for it to reach its actual result. However, the Court's subsequent decision in *Middlesex County Sewerage Authority v. National Sea Clammers Association*²³ made it clear that they are more than straws in the wind. The case as it came to the Court did not involve Section 1983 at all. Plaintiffs claimed injury to fishing grounds from discharges and ocean dumping of sewage and other waste. They asserted an implied right of action under the Federal Water Pollution Control Act and the Marine Protection, Research, and Sanctuaries Act of 1972. The Court rejected this argument on the ground that both statutes contained extensive enforcement mechanisms and that it was unlikely that Congress intended to create additional remedies.

Justice Powell, joined by six other justices, also considered whether plaintiffs might invoke Section 1983 against any state and local defendants in the case. He bowed in the direction of *Thiboutot*, but cited *Pennhurst* for the proposition that "[t]he Court, however, has recognized two exceptions to the application of Section 1983 to statutory violations." These exceptions are preclusion of any private enforcement in the underlying statute itself and a lack of any rights secured to the plaintiffs in that statute. He found the first exception applicable, again relying on the elaborate enforcement procedures in the two statutes.

¹⁹Thomas Madden, "Enforceability of Grant Conditions: Implications of Supreme Court's Decision in *Pennhurst State School v. Halderman*," *Grants and Assistance News*, Washington, DC, National Assistance Management Association, 4, July 1981, pp. 12-14.

²⁰*Camenisch v. University of Texas*, 101 S. Ct. 1830, 1835 (1981) (Burger, C. J., concurring).

²¹E.g., *Lloyd v. Regional Transportation Authority*, 548 F. 2d 1977 (7th Cir. 1977). Statutes frequently provide duties to be enforced by a federal agency but are silent as to whether injured private parties may sue to enforce these duties. Courts examine the statute to determine if "implying" such a right would be consistent with Congress' intent.

²²100 S. Ct. 2502 (1980).

²³101 S. Ct. 2615.

These two decisions indicate a substantial retreat from *Thiboutot*. The *Pennhurst* statements may be dictum, but *National Sea Clammers* is a holding. The general question which it raises is to what extent the two exceptions swallow up the rule and eliminate third party grant suits.

The first exception is triggered if the remedy is sufficiently extensive to show Congressional intent to make it exclusive. The strongest case is that of citizens suits—express authorization for private enforcement—such as contained in the revenue sharing statute,²⁴ which afford the plaintiff some remedy. In the grant context the typical scheme is for administrative enforcement only, with no mention of a private suit. In *Pennhurst* Justice Rehnquist suggested that this might be enough. However, such a conclusion could virtually wipe out the doctrine of implied rights of action, which grew up in precisely such a context, albeit involving regulatory statutes. As for grant suits, it would require a rethinking of the welfare cases brought by third parties, particularly *Rosado v. Wyman*²⁵ in which the Court stressed the value of private judicial enforcement. Obviously, the scope of the first exception will be a principal battleground in grant litigation for years to come.

The operation of the second exception is harder to gauge. At what point do grant conditions—whether program specific or cross-cutting—create rights? Antidiscrimination provisions fit, but the situation is less clear when one comes to preferences, bills of rights, statutory findings, and the like. Perhaps courts, looking to *Pennhurst*, will require a “clear statement” that a grant condition creates individual rights as well as duties on the part of the grantee. It is particularly significant that Justice Rehnquist suggested that assurances to the grantor might not create enforceable rights for plaintiffs.²⁶

The net result of the two exceptions may be that the Section 1983 inquiry has become identical with implied right analysis. In the latter context the Supreme Court has focused on two factors: whether the plaintiff is an especial beneficiary of the underlying statute, to the extent that it can be viewed as conferring rights upon him; and, whether the legislative history contains any evidence to provide or deny a private right of enforcement.²⁷ The Court has been increasingly harsh on would-be implied right plaintiffs. There is growing reason to expect the same result in the Section 1983 context, *Thiboutot* notwithstanding.

What Remedies are Available? The Retreat from *Cannon*

The question of what relief is appropriate arises most acutely in third party challenges to grantee practices. The conditions attached to federal grants, sometimes referred to as “mandates,” are not clearly distinguished from coercive exercises of federal reg-

ulatory power. Yet it is far from clear whether Congress may utilize the spending power to impose any direct obligations.²⁸ Many grant cases obscure the distinction as well. Courts have allowed remedies in the nature of specific performance;²⁹ awarded damages;³⁰ and held that state statutes inconsistent with the terms of federal grant statutes are invalid under the Supremacy Clause.³¹

In many instances the plaintiff will not desire to block the flow of federal funds to the grantee, but to use a grant condition as leverage to force a change in the grantee's conduct to benefit the plaintiff. An important decision in this respect is *Cannon v. University of Chicago*,³² where the plaintiff alleged sex discrimination in a federally aided education program. She based her complaint on Title IX of the Education Amendments of 1972, which prohibits such conduct. The lower courts ruled that the statute afforded her no private right of action to enforce it. The Supreme Court reversed. Writing for the plurality, Justice Stevens drew a sharp distinction between administrative proceedings for termination of funds, and “the award of individual relief to a private litigant” He characterized the former as “severe” and inappropriate in the case of an isolated violation. He reasoned that limiting the private plaintiff to a suit to compel the agency to commence enforcement proceedings would also be disruptive. He declared “unquestionably correct” the agency's position that “the individual remedy will provide effective assistance to achieving the statutory purposes.” It would make “little sense” to require a showing by plaintiff of discrimination that would warrant termination.

All of this glosses over the questions of what plaintiff does have to show and, more importantly, what remedy is appropriate. In particular, how does one reconcile “the award of individual relief” with the fundamental doctrine laid down in the foundation cases that the grantee's participation is voluntary? In other words, how can one treat voluntary participation as akin to adherence to a binding norm? Courts have, at times, seen these problems. Notably, in *Rosado v. Wyman*, Justice Harlan stated that the “unarticulated premise” in a third party challenge was that the grantee had the choice of conforming to the federal norm or giving up the federal funds.

As *Cannon* illustrates, the Court's approach to problems raised by the voluntariness doctrine is not always consistent, or even indicative of an awareness of them. However, in *Pennhurst*, Justice Rehnquist indicated that the Court is prepared to confront the remedial issues presented by third party challenges.

²⁸See *Pennhurst State School and Hospital v. Halderman*, 101 S. Ct. 1531, 1540, n. 13.

²⁹E.g., *Camenisch v. University of Texas*, 616 F. 2d 127 (5th Cir. 1980), vacated, 101 S. Ct. 1830 (1981).

³⁰See Richard Cappalli, “Federal Grants and the New Statutory Tort: State and Local Officials Beware!,” *Urban Lawyer*, 12 Summer 1980, p. 445.

³¹E.g., *Carleson v. Remillard*, 406 U.S. 598 (1972).

³²441 U.S. 667 (1979).

²⁴31 U.S.C. 1244.

²⁵397 U.S. 397 (1970).

²⁶But see *Lau v. Nichols*, 414 U.S. 563 (1974).

²⁷See, e.g., *California v. Sierra Club*, 101 S. Ct. 1775 (1981).

“ In many instances, the plaintiff will not desire to block the flow of federal funds to the grantee, but to use a grant condition as leverage to force a change in the grantee’s conduct. . . . ”

He stated that plaintiffs’ “relief may well be limited to enjoining the federal government from providing funds to the Commonwealth.” This may mean either that no Section 1983 suit could be brought at all, or that private plaintiffs would have only remedies analogous to those available to the federal government: a declaration that the grantee is not in compliance, and an either/or decree that it alter its conduct or forego federal funding for the activity in question.³³

Justice Rehnquist cited *Rosado* and admitted that subsequent decisions were not always consistent with it. It is also significant that the three dissenting justices agreed with Justice Rehnquist on the remedial issue. In particular, Justice White disapproved of the lower court’s appointment of a special master with broad powers. Such remedies are frequent in Constitutional litigation. However, there the court is enforcing a binding norm, and the element of “opting out” is not available. *Pennhurst* forces courts to make this distinction when considering the remedial aspects of a third party grant challenge. Once again, its influence on future grant litigation is likely to be profound.

Grant Litigation: Volume, Causes, and Impacts

Grant law—more precisely, grant litigation—is clearly a “hot” area. The growing volume of cases involves issues which are highly complex and significant to the operation of the grant system.

“A Veritable Explosion”

The rising tide of lawsuits generated by federal grant programs and their administration has been documented. As early as 1972, Professors Frank Michelman and Terrance Sandalow reported a “veritable explosion” in grant challenges by third parties.³⁴ In a 1976 analysis of litigation under the *Housing and Community Development Act*, Prof. Richard Kushner reported that “[m]ore legal challenges have been made in the first year of the [Housing and Community Development Act] than under

the past decade of urban renewal and categorical grants.”³⁵ Others have described and analyzed the growing judicial role in grant programs.

However, it was not until 1979 that an attempt was made to compile and classify all reported grant decisions. This “Survey of the Caselaw Relating to Federal Grant Programs” is one of a series of working papers in the Office of Management and Budget’s *Study of Federal Assistance Management Pursuant to the Federal Grant and Cooperative Agreement Act of 1977* (P.L. 95-224).³⁶ It was prepared under the direction of Thomas Madden, then General Counsel of the Law Enforcement Assistance Administration. The survey is an exceptionally valuable research tool for lawyers and others working in the field.

Even this effort was not comprehensive, however. The authors themselves acknowledged that the document is not complete and that there are areas of grant law which are not fully covered. Our intent when this project began was to collect all of the caselaw relating to federal grant programs. Our best estimate was that there were no more than 200 cases in the area. When we ended our search, we had discovered over 500 cases, and we estimate that there are still more to be discovered.

It is probably impossible to calculate with any precision the number of decided grant cases, let alone those that are filed but settled or otherwise disposed of along the way. For example, many important district court cases are simply not reported at all. Nonetheless, it seems clear that the OMB researchers were correct in concluding that the volume of cases was far greater than previously realized. Moreover, it seems equally clear that the number of cases is increasing.³⁷

Why are grantors, grantees, and third parties turning, in ever increasing numbers, to the federal courts for resolution of grant disputes? A simple explanation of the phenomenon might be that as the volume of grant dollars increased, a parallel increase in grant related suits was to be expected, especially in a litigious society such as ours. The real reasons are somewhat more complex, however. They can be found, to some extent, in changing doctrines of federal jurisdiction, which have expanded judicial access generally. Other causes lie within the grant system itself.

Judicial Developments and the Grant Litigation Explosion

The judicial doctrinal developments have received considerable attention in the legal literature and will

³³The federal government has an additional remedy: specific performance to enforce the assurances during their term. See *United States v. Marion County School District*, 625 F. 2d 607 (5th Cir. 1980).

³⁴Frank I. Michelman and Terrance Sandalow, *Government In Urban Areas*, Supplement, St. Paul, MN, West Publishing, 1972, p. 275.

³⁵Richard Kushner, “Litigation Strategies and Judicial Review Under Title I of the *Housing and Community Development Act of 1974*,” *Urban Law Annual*, 11, 1976, pp. 37-98.

³⁶Office of Management and Budget, *Managing Federal Assistance in the 1980s, Working Paper A-7*, Washington, DC, U.S. Government Printing Office, 1979.

³⁷Thomas Madden, “The Law of Federal Grants” in Advisory Commission on Intergovernmental Relations, *Awakening the Slumbering Giant: Intergovernmental Relations and Federal Grant Law*, M-122, Washington, DC, U.S. Government Printing Office, 1980, pp. 9-10.

be dealt with only briefly. The important point here is that the three traditional judicial constraints or barriers—standing, right of action and exhaustion of remedies—have in recent years been relaxed considerably. As a result, the floodgates of grant litigation have been opened even wider.

Standing. Standing is a flexible—some might say manipulable—concept. To have standing to sue in federal court a plaintiff must demonstrate harm, causal nexus between that harm and the defendant's conduct, and some likelihood that judicial intervention will alleviate the situation. In the mid-1970s the Court appeared to be turning standing into a formidable barrier, particularly for litigants who complained of harm at the hands of someone other than the defendant. However, recent Supreme Court decisions have taken a much less restrictive approach, requiring, for example, only that a favorable ruling be "likely" to benefit the plaintiff.³⁸ The lower courts have generally followed the Court's lead in grant suits and other contexts.

Right (or Cause) of Action. In the late 1970s, this obstacle also became a good deal less threatening, as courts were frequently willing to imply a right to sue from the underlying statute. The principal cause of this development is the Supreme Court's 1975 decision in *Cort v. Ash*.³⁹ The Court laid out four factors which determine whether to imply a private right of action: whether the statute creates particular benefits or rights in favor of the plaintiff; the bearing, if any, of legislative history; the effect of private suits on enforcement of the statute; and whether the subject matter is federal or one traditionally left to state law. The lower courts have applied *Cort* very liberally in the grant context, primarily because of the wide range of benefits and rights which grant programs and cross-cutting conditions create. Alternatively, the decision in *Thiboutot* appeared to remove even the need for this inquiry, since third parties suing state and local grantees could rely on Section 1983.

Exhaustion of Remedies and Primary Jurisdiction. These interrelated doctrines express a judicially created preference for the administrative process as the first point of recourse when a plaintiff's claims are either against an agency or lie within an agency's special expertise. It might be expected that courts would invoke them frequently in third party challenges to grantee practices. By and large, this has not been the case. A principal reason has been the Court's view that the grievance procedures offered to third parties are inadequate. The Supreme Court in *Cannon* emphasized the fact that the complainant could not participate in the process. The courts seem to feel that requiring recourse to the administrative process would defeat the purpose of allowing a private, third party suit. It is not clear why this should be so, especially if the grantor agency does have

something to contribute. No doubt agency ambivalence on this issue has influenced the judges in this direction.

Other elements contributing to the upsurge in grant litigation include judicial and legislative relaxation and ultimate abolition of the \$10,000 minimum in federal question cases, and the growing availability of attorney's fees in grant cases. Still, it is also necessary to consider changes within the grant system itself.

The Evolving Grant System As Generator of More Litigation

The major change which is most clearly related to grant litigation is the proliferation of the cross-cutting or national policy conditions. These create substantial new clusters of interests—and interest groups—with which a grantee must reckon. Members of these interest groups—such as the handicapped and environmentalists—are frequently well organized and both willing and able to take judicial action. Frequently, they have the assistance of highly specialized "back-up centers" with great expertise in the relevant area. Third party challenges based on asserted violations of the cross-cutting conditions are probably the biggest single growth area within the overall field of grant litigation. At the same time, the rapid growth of these cross-cutting conditions may well be a principal cause of current dissatisfaction with the system. If so, the availability of the federal courts as enforcers has important systemic consequences.

The volume of third party challenges based on program specific conditions, which prescribe how the money is to be spent, is growing as well. A good example is the body of caselaw under the **Education for All Handicapped Children Act**, based primarily on the act's condition that participating states provide all children a "free, appropriate public education." Thus, it is the case that an increase in grant programs—as opposed to grant dollars—will generate more litigation. The point is that here—as in the case of the cross-cutting conditions—Congress has created new interests which can claim judicial protection.

As far as the rise in grantor-grantee disputes is concerned, Prof. Richard B. Cappalli cites the following factors, in addition to judicial developments:

- (1) the change in thinking about the grant from the concept of a gift to that of an entitlement;
- (2) the ever increasing complexity of the grant, as Congress adds more "strings". . . ;
- (3) tremendous expansion of the world of grantees, primarily through the extension of various grants to thousands of local governments and special districts;
- (4) movement away from discretionary grants to formula entitlements, thereby lessening grantor leverage over grantee behavior. . . .⁴⁰

³⁸E.g., *Regents of University of California v. Bakke*, 438 U.S. 265 (1978).

³⁹422 U.S. 66 (1975).

⁴⁰Richard Cappalli, "Federal Grant Disputes: The Lawyer's Next Domain," *Urban Lawyer*, 11, Summer 1979, pp. 377-88.

The first and fourth factors are perhaps the most significant, in terms of grantee willingness to "fight back." The earlier, highly discretionary grant system was exceedingly one-sided and contained the potential for unbridled exercises of discretion relatively immune from judicial scrutiny. The present system, dominated by formula based programs, creates a sense of entitlement; and since federal funds are an increasingly significant component of state and local budgets, any potential loss is now likely to be contested vigorously.

In sum, the judicial and systemic developments have interacted: Congress has created a plethora of new rights during a period when the federal courts have been increasingly receptive to the assertion of claims based on federal law. The obvious result has been the explosion of grant litigation. What is not obvious is what the effects of this explosion may be on the operation of the system itself.

Impacts of the Explosion

Attempts at an across-the-board assessment of the impact of grant litigation must be somewhat judgmental and subjective. In any given case it may be possible to identify specific results, but the state of the art does not permit empirically based general conclusions. Nonetheless, the subject would appear to warrant some consideration, if only because of the pervasive presence of the courts as actors in the operation of grant programs.⁴¹ Since the systemic consequences of grantor-grantee suits may be quite different from those of third party suits, the effects will be considered separately.

Grantor-Grantee Litigation. Some analysts view the recent increase in grantor-grantee litigation as unhealthy. For example, the Office of Management and Budget has stated that "[t]he number of disputes between federal assistance agencies and recipients is growing apace with the growing importance and complexity of federal assistance. Not only is this costly, it is disrupting what should be partnerships to get things done."⁴² In a similar vein, Prof. Cappelli has argued that the judicial forum is inadequate, noting that the courts are "confined in the review function," that the decision may at best involve a remand, and that suits are costly and time-consuming.⁴³ He concludes that the "ultimate disadvantage is the hostility which litigation engenders," and expresses a strong preference for the administrative process.

On the other hand, one can make the case that going to court is perhaps only another step, albeit a painful one, in an ongoing relationship and that the ability of grantees to sue obviously introduces an element of equalization into the relationship. The

ACIR appears to have accepted this position as early as 1964;⁴⁴ and a number of federal statutes authorize appeals by grantees from adverse financial decisions.⁴⁵ Availability of the judicial forum is particularly important in cases where the grantee is attacking the grantor's interpretation or the statute itself.

Third Party Challenges. The arguments in favor of suits by third parties attacking the award or administration of federal grants appear to be substantially stronger. Justice Harlan's opinion in *Rosado v. Wyman*, suggests two purposes which such suits further: making certain that Congress' will is not ignored by grantees, and protecting the individual beneficiaries of federal aid programs. These justifications overlap but can be examined separately.

Congress attaches conditions to federal aid in order to achieve what it perceives as national objectives. The very presence of any string—program specific or cross-cutting—represents a potential displacement of the grantee's freedom to choose, in that the grantee might well not have chosen to follow the course of conduct "mandated" by the string. That is why Congress imposed the condition in the first place. Yet the grantee may wish to evade or disobey grant conditions due to a desire to cut costs, a legitimate disagreement over how best to operate a program, or an outright desire to convert federal dollars to uses other than those intended by Congress. Thus, allowing third parties to sue to enforce grant conditions is an essential tool to help keep the grantee honest.

It is also important to focus on the types of person likely to bring such suits. In many instances, they will be individuals or groups with little clout in the grantee's political processes. Examples include welfare recipients such as the Thiboutot plaintiffs, racial minorities, classes such as the handicapped, low income persons generally, or those promoting a locally unpopular cause such as environmental protection. A fundamental premise which underlies much of the present grant system is that state and local governments cannot be counted on to respond adequately to such interests. Thus, third party grant suits represent one more instance of the federal courts serving as "the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States."⁴⁶

On the other hand, it may be that third party suits contribute to the "overload" which ACIR has identified as a principal problem of the present grant system. The Commission argues that problems of effectiveness, efficiency, costliness, and accountability are widespread. Third party suits can contribute to the cost of participating in grant programs. There are the costs of defending the suit, increased project costs in case of delays, possible attorney's fees, and

⁴¹The role which courts play in establishing the Constitutional parameters of grant programs—in cases such as those discussed earlier—has received considerable attention.

⁴²Office of Management and Budget, *Managing Federal Assistance in the 1980s*, Washington, DC, U.S. Government Printing Office, 1979.

⁴³Richard Cappelli, *Rights and Remedies Under Federal Grants*, Washington, DC, Bureau of National Affairs, 1979, pp. 169-71.

⁴⁴Advisory Commission on Intergovernmental Relations, *Statutory and Administrative Controls Associated with Federal Grants for Public Assistance*, A-21, Washington, DC, U.S. Government Printing Office, 1964, pp. 81-83, 93-95.

⁴⁵E.g., 31 U.S.C. Section 1245 (revenue sharing).

⁴⁶*Steffel v. Thompson*, 415 U.S. 452, 464 (1974) (Brennan, J.).

even damages. Third party suits also contribute to the complexity and uncertainty of administering federal aid programs. Grantees are likely to insist on elaborate federal guidance and refrain from innovation out of fear of being hauled into court. Accountability issues also emerge, increasing the opportunity for finger pointing and buck passing. To the extent that participation in grant programs becomes more and more unattractive, the phenomenon of opting out is likely to increase.

Grant suits can also frustrate the achievement of program goals. Take the case of an economic development project involving federal, local, and private funds, which is attacked on the grounds of inadequate citizen participation. If the court agrees with plaintiffs and grants an injunction, the resultant delay will drive up costs. The public funds may no longer be sufficient. The developer may pull out. Which would Congress have preferred: the project without the participation, or the participation without the project? The court is not in any position to make such trade-offs. It must enforce the grant conditions as they are written.

In sum, grant litigation, of whatever variety, raises serious institutional questions. Are the various forms of judicial involvement a good thing? Until now the question has largely been unasked, perhaps because the explosion is recent, perhaps because many of those working on grant reform are not lawyers and are understandably perplexed by arcane concepts of federal jurisdiction. Yet the role of the courts seems too important not to be addressed.

The Courts and Grant Reform: A Time for Action

One can argue that a conscious decision should be made **not** to address the issue of courts and grant reform—to leave it to the lawyers and the courts after all. Indeed, cases such as *Pennhurst* indicate the possibility of judicial self correction. However, if the system is in need of reform—a point generally conceded—that effort ought to at least consider the role of this important, and relatively new, actor: the federal judiciary. (Although the recently enacted block grants may alter the fiscal and political landscape, there is no indication that the judicial role will be significantly altered.)

Short of Congressional action, the grantor agencies might develop accessible and workable grievance procedures. Agency practice in this area varies tremendously but, in general, the administrative avenues available are not viewed as adequate. (Plaintiffs sometimes “exhaust” them anyway, just to be on the safe side.) The availability of such procedures might lead to the resolution of a large number of disputes in a forum more susceptible to negotiation and mediation than a lawsuit. Moreover, the courts would be far more willing to invoke the doctrines of primary jurisdiction and exhaustion of remedies than they are at present.

Still, the primary responsibility rests with Congress. It would be virtually impossible to address the issue of the role of the courts in any across-the-board legislation. The grant programs are simply too varied, and the disputes they generate too dissimilar. Block grants present different issues than categorical programs. It makes a difference whether one is talking about suits to enforce the cross-cutting conditions, or program specific strings. Many different, and difficult, value judgements have to be made. Allegations of racial discrimination in a grant program are more serious candidates for federal judicial review than claims by disappointed vendors that the grantee has violated contractual obligations, while claims of insufficient citizen participation lie somewhere in between. At the moment it is the courts which make these judgments, on an ad hoc basis.

Ideally, the role of the courts ought to be addressed specifically each time the Administration and the Congress deal with restructuring or reauthorizing each grant program. It should be possible to identify in advance the types of third-party disputes which a given program will generate. Policymakers could then decide which should be insulated from judicial review, which should receive limited judicial review, and which should receive whole-scale review of the sort awarded in most third party suits as things stand now. For example, citizen participation issues might be resolved using agency forums, while complaints of racial or sexual discrimination would still be able to be heard in the courts, perhaps after exhaustion of administrative remedies. So far, this has happened only occasionally. The most notable example is the General Revenue Sharing Amendments of 1976, which created an elaborate citizens suit provision including a complaint mechanism and an exhaustion requirement.

As a first step, then, those who deal with grant reform must add the role of the courts to the agenda, recognizing it as a new item. Empirical research is needed to bring to light the judicial impact on categories and subcategories of grant disputes.

The ultimate policy decisions will no doubt rest primarily on a balancing of the relative values accorded to the programmatic and federalism goals to be served by any federal grant statute, and the rights and interests of the individuals affected by such programs. The task is not easy; the trade-offs are difficult. Nonetheless, these issues have been simmering just beneath the surface for some time now. An honest dialogue will be necessary to arrive at an adequate resolution. At the very least, it is time for the dialogue to begin.

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